90-1517

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF OHIO, et al.,

Cross-Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CROSS-PETITION OF THE STATE OF OHIO

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QUESTIONS PRESENTED

1. Whether Section 7002 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6972, waives the sovereign immunity of the United States from assessment of state civil penalties for violation of state hazardous waste laws.

2. Whether Sections 313 and 505 of the Clean Water Act, 33 U.S.C. 1323, waive the sovereign immunity of the United States from assessment of federal civil penalties for violations of the Clean Water Act.

PARTIES TO THE PROCEEDINGS

This case was brought in the district court and litigated in the Court of Appeals by the State of Ohio on the relation of its Attorney General, Anthony J. Celebrezze, Jr. succeeded by Lee Fisher. The Defendants-Appellants before the Court of Appeals were the U.S. Department of Energy and Secretary of Energy James D. Watkins.

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The decision of the court of appeals is reported at 904 F.2d 1058 and is reprinted at pages 1a-27a in the Appendix of the Department of Energy's Petition for a Writ of Certiorari. The decision of the district court is reported at 689 F.Supp. 760 and is reprinted at pages 28a-46a of the same Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on June 11, 1990. A petition for rehearing was denied on October 10, 1990. On December 28, 1990, Justice Stevens extended the time for filing a Petition for a Writ of Certiorari to February 7, 1991. On January 30, 1991, Justice Stevens further extended the time for filing a petition to and including February 22, 1991. The State of Ohio received the Department of Energy's Petition (No. 90-1341) for a Writ of Certiorari on February 25, 1991 and is filing this cross-petition in reliance on Rule 12.3 of the Court. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 313(a) and 505(a) of the Clean Water Act ("CWA"), 33 U.S.C. 1323(a), 1365(a), are reproduced at pages 49a-52a of the Appendix to the Department of Energy's Petition for a Writ of Certiorari. Section 6001 of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. 6961, is reproduced in the Appendix to the State's Brief in Opposition to DOE's Petition. Section 3734.13(C) of the Ohio Revised Code is reproduced at pages 54a-55a of the Appendix to the DOE Petition.

STATEMENT OF THE CASE

The facts relevant to this Cross-Petition have been described in the Statement of the Case for the State's Brief in Opposition to the Department of Energy's Petition for a Writ of Certiorari. The State's Statement of the Case in that brief is hereby incorporated by reference.

REASONS FOR GRANTING THE CROSS-PETITION

I. As Shown By The Widespread National Interest In This Case, The Elimination of Dangerous And Illegal Hazardous Waste Activities By Federal Agencies Is Vital For the Protection Of The Public.

When enacting the Resource Conservation and Recovery Act (RCRA), Congress was primarily concerned about the unsafe management and disposal of hazardous waste. H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3 (1976) *reprinted in* 1976 U.S. Code Cong. & Ad. News 6241. The House found that these wastes can "blind, cripple or kill . . . defoliate the environment, contaminate drinking water supplies and enter the food chain." H.R. Rep. No. 1491 at 11, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6249. See also, the 59 examples of groundwater pollution, fish kills, wildlife and livestock kills, and human poisonings cited by the House to illustrate the problems resulting from improper hazardous waste disposal. H.R. Rep. No. 1491 at 17-23, 1976 U.S. Code Cong. & Ad. News at 6254-61.

Hazardous waste mismanagement at federal facilities was a real concern for Congress since the federal government had over twenty thousand facilities. H.R. Rep. No. 1491 at 46, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6284. Because Congress realized that a comprehensive program to prevent hazardous waste pollution would be ineffective without the cooperation of federal facilities, Congress wanted federal facilities to "provide national leadership in dealing with solid waste and hazardous waste disposal problems." S. Rep. No. 988, 94th Cong., 2d Sess. 24 (1976).

A January, 1990 report by a task force commissioned by the National Governors Association and the National Association of Attorneys General estimates that the Department of Defense alone generates approximately

750,000 tons of hazardous waste each year.[1] This quantity of waste is more than the annual production of waste by the five largest U.S. chemical companies combined.[2]

Because the federal government is the nation's worst polluter, Ohio as well as other states and the public have a vital stake in eliminating the pervasive hazardous waste hazards at federal facilities. Twenty-three (23) amici states supported Ohio below in the Sixth Circuit by filing a brief urging the court of appeals to effectuate Congress' waiver for state hazardous waste penalties. Ohio was also supported by a number of public interest organizations.

Given the dangers posed by toxic wastes at federal facilities, it should come as no surprise that, of the four civil penalty issues in this case, the state hazardous waste penalty issue has stirred the most national interest. In fact, the number of cases related to state hazardous waste penalties is greater than the total number of cases for the other three penalty provisions combined. See the cases listed at page 25 of DOE's brief.[3] Therefore, this is an extremely important question of national interest which should be addressed by the Court.

II. Because The Department Of Justice Prohibits The U.S. Environmental Protection Agency From Suing Or Penalizing Sister Federal Agencies For Illegal Hazardous Waste Activities, The States Must Be Allowed To Utilize The Civil Penalty Deterrent Provided By Congress To Enforce The Law At Federal Facilities.

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[1] Report of the NGA-NAAG Task Force on Federal Facilities, *From Crisis To Commitment: Environmental Cleanup And Compliance At Federal Facilities*, (January, 1990), p. 3.

[2] *Id.*, at p. 3-4.

[3] It should be noted, however, that one of the cases on DOE's list of civil penalty cases does not address civil penalties at all. *Florida Dep't. of Envtl. Regulation v. Silvex Corp.*, 606 F.Supp. 159 (M.D. Fla. 1985).

The importance of effective state enforcement is heightened by the comparative inability of the U.S. Environmental Protection Agency ("U.S. EPA") to enforce the pollution laws against its sister agencies. Under Department of Justice policy, the U.S. EPA is not allowed to file suit against other federal agencies or to penalize them. As a result, former U.S. EPA Assistant Administrative J. Winston Porter testified before Congress that U.S. EPA had been forced to rely on "jawboning" federal agencies in attempt to obtain compliance. Report of NGA-NAAG Task Force, p. 7.

Therefore, in the absence of U.S. EPA enforcement, the states are left to conduct enforcement at federal facilities. It is thus essential that the states be allowed to utilize the civil penalty deterrent Congress intended them to use against uncooperative federal agencies. Because the court of appeals below struck that deterrent tool from the Congressional waiver, review by this Court is necessary to repair the waiver and restore Congressional intent.

III. The Courts' Continued Failure To Implement The Civil Penalty Waiver Provided By Congress Will Magnify The Multi-Billion Dollar Cleanup Crisis Caused By Illegal Federal Agency Pollution Activities.

Careless and illegal pollution from federal facilities is a federal disaster, creating a national cleanup crisis which will cost the taxpayers billions of doilars to remedy. The General Accounting Office and others have estimated that contaminated Department of Energy sites alone will cost between $95 billion to $130 billion to remedy. Report of the NGA-NAAG Task Force, p. 3. Even if DOE works aggressively on this cleanup, the Department has predicted that this mammoth task will take thirty years to complete.

This epic cleanup crisis did not develop overnight. Instead, this cleanup problem is rooted in decades of federal agency disregard for state and federal pollution laws. Convinced that they had sovereign immunity against punishment, these agencies continued to violate the law even after Congress

enacted stricter legislation in a vain attempt to inject responsibility into federal pollution practices.

The history of federal agency neglect, as chronicled in the legislative history of federal pollution control statutes, is useful for two purposes. First, it demonstrates the importance of the RCRA civil penalty waiver and thus the importance of granting this Cross-Petition. Second, this history shows what Congress had in mind when it wrote the civil penalty waiver, an intent discarded by the court's decision below.

While considering the Clean Air Act of 1970 and the Federal Water Pollution Control Amendments of 1972, Congress noted with dismay the "many incidents of flagrant violations of air and water pollution requirements" by federal activities. S. Rep. No. 414, 92d Cong., 2d Sess. 67, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3733-34. Both the House and Senate noticed that the bad federal example was discouraging private compliance as well. *Id.;* H.R. Rep. No. 911, 92d Cong., 2d Sess. 188 (1972). As a result, Congress inserted, into both the air and water statutes, waivers requiring federal agencies to obey federal, state, and local pollution control laws.

This legislation, however, did not stop, or even slow down, federal facility pollution. By refusing to apply for and obtain pollution control permits, federal agencies stymied the states' attempts to halt federal pollution.

The states' attempts to control federal agency pollution through permits ended in federal agency challenges to the waivers in both the Clean Air Act in *Hancock v. Train,* 426 U.S. 167 (1976), and the Federal Water Pollution Control Act in *EPA v. California,* 426 U.S. 200 (1976). Narrowly construing the waivers in both statutes, the Court ruled that Congress had not intended to waive immunity for permits and other enforcement mechanisms.

Congress reacted sharply to these decisions when it passed RCRA in 1976 and amended the Clean Air Act and

Federal Water Pollution Control Act in 1977. Finding that "many federal agencies continue to try to evade the mandate of Federal law to comply with all State and local requirements," the House discovered that the agencies had been invoking sovereign immunity to avoid their air pollution control duties. H.R. Rep. No. 294, 95th Cong., 1st Sess. 199, *reprinted in* 1977 U.S. Code Cong. & Ad. News at 1277-78. The House then discussed the Hancock decision, stating:

> In the committee's view, the language of existing law should have been sufficient to insure Federal compliance in all of the aforementioned situations. Unfortunately, however, the U.S. Supreme Court construed Section 118 narrowly in *Hancock v. Train*. . . . The new section 113 of the bill is intended to overturn the *Hancock* case . . . .

Id. Congress had a similar adverse reaction to the Supreme Court decision in *California*, commenting:

> The act has been amended to indicate unequivocally that all Federal facilities and activities are subject to *all of the provisions of State and local pollution laws*. Though this was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent.

S. Rep. No. 370, 95th Cong., 1st Sess. 67 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 4392 (emphasis added).

Dismayed by the widespread failure of federal agencies to abate their pollution even while private citizens were doing their part to protect the environment, Congress amended the waivers in both the air and water statutes. To end federally sponsored pollution, Congress inserted broadly worded waivers into both statutes designed to authorize *all* enforcement mechanisms against federal agencies. A similar broad waiver was inserted into RCRA, enacted only months after the *Hancock* decision.

Therefore, Congress intended to remove the cloak of sovereign immunity from enforcement sanctions in order to overcome federal agency obstacles to a clean environment. Buoyed by their successes in *Hancock* and *California*, however, federal agencies continued to ignore their pollution control obligations. Confident in their ability to persuade the courts to restrictively interpret the waivers, federal agencies took the position that they could not be punished even though they continued to disobey the law.

Unfortunately, the agencies have enjoyed continued success in many of their attempts to invoke sovereign immunity against enforcement mechanisms despite the clear intent of Congress to waive immunity from these mechanisms. In response to state attempts to enforce their hazardous waste laws at federal facilities, federal agencies have persuaded some of the courts to disregard the waiver for civil penalties and other enforcement mechanisms provided by RCRA. See the list of cases on page 25 of DOE's Petition. As a result, these courts have removed from the states' arsenal the most effective deterrent against the creation of yet additional cleanup problems.

Federal agencies would have taken greater care to comply with the law had they thought they could be penalized for their illegal behavior. Had federal agencies not been complacent in their ability to persuade the courts to ignore Congressional waivers of sovereign immunity, the multi-billion dollar cleanup crisis would have been substantially avoided. Unless the Court grants Ohio's petition and corrects the court of appeals below for deleting state hazardous waste penalties from the waiver, the states will lose their most effective weapon against this costly, federally sponsored pollution.

IV. By Discarding The History Preceding The Enactment Of The RCRA Waiver, The Court Of Appeals Violated The Rules of Statutory Construction Applicable To Waivers Of Sovereign Immunity Set Forth By This Court

And Established A Rule Of Law Inconsistent With This Court's Holding In *Hancock v. Train.*

A. The Sovereign Immunity Decisions Of This Court Require That Congressional Intent Be Ascertained and Implemented.

When interpreting part of a statute, the courts do not look solely at the specific language being construed. Rather than reading a statutory section or sentence in isolation and out of context, the courts examine the whole statute as well as its objective and policy. *Philbrook v. Glodgett,* 421 U.S. 658, 713 (1975); *Richards v. United States,* 369 U.S. 1, 11 (1962).

In performing such an examination, the courts' goal is to ascertain congressional intent and to effectuate it. *Philbrook,* 421 U.S. at 713. The courts are not to adopt a "crabbed construction" of a waiver or to insist that Congress use "a ritualistic formula" to waive immunity. *Franchise Tax Bd. of Cal. v. U.S. Postal Service,* 467 U.S. 512, 521 (1984). Instead, the scope of a waiver can be ascertained only by reference to "underlying congressional policy." *Id.*

When interpreting Congressional intent in a statute waiving the sovereign immunity of the United States, the courts have found the public feeling toward sovereign immunity reflected in the statute to be a helpful barometer of Congressional objectives and goals. While discussing "the immunity enjoyed by the United States as territorial sovereign," the Supreme Court explained the necessity of gauging public/Congressional feeling in the following words:

> The outlook and feeling thus reflected are not merely relevant to our problem. They are important. . . . A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process.

National City Bank of New York v. Republic of China, 348 U.S. 356, 359-60 (1955). *See* also, *United States v. Yellow Cab Co.,* 340 U.S. 543, 550 (1951).

Therefore, the Court has acknowledged that public and Congressional feeling about sovereign immunity under a statute influences Congressional purpose, and that the courts' understanding of the public climate are vital to interpreting Congressional intent. This climate can be ascertained from the words and legislative history of a statute.

The district court below conscientiously followed the sovereign immunity decisions of this Court by carefully analyzing the history of the RCRA waiver. Upon completion of this analysis, the district court honored the obvious Congressional response to *Hancock* in waiving immunity for all enforcement mechanisms. The court of appeals, however, paid only lip service to the obvious Congressional intent to waive immunity for penalties and reversed the district court. Because the court of appeals declined to follow Congressional intent contrary to the opinions of this Court, the Court should review this matter.

B. Because This Court In *Hancock v. Train* Equated "Procedural Requirements" With "Enforcement Mechanisms," Congress Waived Federal Agency Immunity For Civil Penalties And Other Enforcement Mechanisms By Subjecting The Agencies To "All Procedural Requirements."

At the time the Court considered the *Hancock* and *California* cases, the air and water statutes waived immunity for "requirements." At issue in these cases was whether "requirements" was meant to include only *substantive* obligations, or whether "requirements" also included *procedural* obligations such as the procurement of permits. Resorting to legislative history, the Court held that Congress did not intend to include permits and other procedural obligations within the meaning of "requirements". *California*, 426 U.S. at 223; *Hancock*, 426 U.S. at 197-98. The Court's distinction between substantive and procedural requirements is extremely important, because it was this distinction that Congress had in mind when writing the present waivers in RCRA.

Before *Hancock*, the Court of Appeals for the Fifth Circuit had phrased the issue in the same fashion, coming to the opposite conclusion. In *Alabama v. Seeber*, 502 F.2d 1238 (5th Cir. 1974), the Fifth Circuit distinguished between substantive duties and enforcement mechanisms in the Clean Air Act, as follows:

> Defendants seek to avoid the impact of §118 by engrafting upon it a *substantive procedural overlay.* They argue that the phrase "requirements respecting control and abatement of air pollution" means only requirements such as emission standards and limitations, which they label *"substantive," and does not include mechanisms, e.g., permit systems, for enforcing these requirements.*

(Emphasis added). *Id.*, at 1245. Relying on the wording of the Clean Air Act waiver, the "scheme of the Act as a whole," and "Congressional purpose," the Fifth Circuit held that enforcement mechanisms were requirements. *Id.*, at 1245-47.

Although the *Seeber* decision was vacated in light of the subsequent decision in *Hancock*, this Court in *Hancock* phrased the issue in the same fashion by quoting from *Seeber:*

> [T]he question is . . . "whether Congress intended that the *enforcement mechanisms* of federally approved state implementation plans, in this case permit systems, would be" available to the States to *enforce* that duty.

426 U.S. at 183 (emphasis added). On page 184 of the *Hancock* opinion, the Court rejected the state's contention that Congress had intended to "subject federal facilities to the *enforcement mechanisms*" of state law (emphasis added). In holding that enforcement mechanisms were not "requirements", the Court repeatedly distinguished between enforcement mechanisms and substantive duties. *Id.*, at 182,

183, 184, 185, 186, 187 n. 48, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198. In fact, the opinion uses "enforcement mechanisms" and derivatives of "enforce" no fewer than thirty-one times when discussing "procedural requirements."

Therefore, just before Congress passed RCRA, the courts had drawn the distinction between substantive requirements on one hand, and enforcement mechanisms or procedural requirements, on the other hand. However, this was just one of *Hancock's* statements which influenced the language later written into the RCRA and Clean Water Act waivers. The Court also declared that it was "notable" that Congress required federal agencies only to comply with "requirements" instead of requiring that they comply with "*all*" requirements. 326 U.S. at 182.

Due to the Court's holdings, Congress wrote waivers for both "substantive" and "procedural" requirements in RCRA, the Clean Water Act, and the Clean Air Act. Because the existing court decisions had expressly referred to enforcement mechanisms as "procedural requirements," Congress in reliance on this distinction waived immunity from both "substantive" and "procedural" requirements in order to subject federal facilities to enforcement mechanisms. Relying heavily on *Hancock's* emphasis on the use of "*all*" to accomplish a *complete* waiver, Congress used the term "*all*" to describe the procedural requirements waived in all three acts. Thus, Congress unambiguously showed its intent to apply *all* enforcement mechanisms to polluting federal facilities.

Because civil penalties are most definitely an enforcement mechanism, Congress very clearly intended to waive immunity for penalties. The court of appeals, however, failed to effectuate that intent and thus has set back Congress' attempt to reduce the dangers and cost of irresponsible hazardous waste activities by federal agencies.

C. By Admitting That Congress Used The Words "All Procedural Requirements" To Waive Immunity For Enforcement Mechanisms, And

Then Ruling That Procedural Requirements Do Not Include Enforcement Mechanisms, The Court of Appeals Violated The Rules Of Statutory Construction Provided By This Court And Adopted A Rule Of Law Contrary To This Court's Decision In *Hancock v. Train.*

In its opinion, the court of appeals discussed and acknowledged the history proceeding the enactment of the RCRA waiver, concluding:

> Circumstances surrounding the passage of the Resource Conservation and Recovery Act also support a finding that "requirements" include civil penalties.

App. to DOE Pet., p. 10a. The court of appeals even admitted that Congress had inserted into the waiver the exact wording the *Hancock* opinion stated would effectuate a clear waiver for all enforcement mechanisms. *Id.*, pp. 10a-11a. This finding is in accord with the district court analysis below, as well as the opinion in *Maine v. Navy*, 702 F.Supp. 322, 329 (D. Me. 1988) (appeal pending, No. 86-0211 (1st Cir.)), both of which held that immunity from civil penalties is waived.

Then the court of appeals inexplicably adopted the Ninth Circuit position *that requirements do not include enforcement mechanisms*, stating that this is "a different plausible" reading of the waiver. *Id.*, p. 12a. This "plausible" reading is flatly contradictory to this Court's decision in *Hancock*, which describes "enforcement mechanisms" as "procedural requirements" thirty-one (31) times.

Therefore, the court of appeals ascertained underlying Congressional intent and policy in accordance with this Court's above-cited decisions in *Franchise Tax Bd.*, *Philbrook*, *Richards*, and *National City Bank*. However, the court of appeals then proceeded to search for "a different plausible" meaning that contradicted that known Congressional intent, thereby adopting a "crabbed construction" of the waiver in violation of this Court's decision

in *Franchise Tax Bd.* Because the court of appeals has disregarded this Court's rules of statutory construction, and because that court's opinion will increase the danger and cost of hazardous waste pollution at federal facilities, the Court should review this matter.

V. By Interpreting The Waiver In A Manner Inconsistent With The Plain Meaning Of The Language And By Creating An Exception To Exempt Penalties From The Broad Waiver Intended By Congress To Cover All Enforcement Mechanisms, The Court Of Appeals Violated This Court's Principles Of Statutory Construction And Thwarted Congressional Policy.

A. Where Congress In General Terms Has Enacted A Broad Waiver Of Sovereign Immunity, The Language Of That Waiver Must Be Interpreted According To Its Common Meaning And In A Manner Which Effectuates The Broad Waiver. Congress Is Not Required To Specifically Spell Out Each And Every Federal Action Included In The Waiver.

When determining the meaning of a waiver, the courts assume that legislative intent is expressed by the ordinary meaning of the words used in the statute. *Kosak v. United States*, 465 U.S. 848, 853 (1984); *Yellow Cab Co.*, 340 U.S. at 548. When construing statutes in general, this Court has consistently declined to depart from the plain meaning of statutory language absent clear indication of contrary legislative intent. *United States v. Turkette*, 452 U.S. 576, 580 (1981). Where the language of a statute broadly waives sovereign immunity, the courts may not whittle it down by resorting to a review of legislative history or other refinements. *Yellow Cab*, 340 U.S. at 549-50.

Furthermore, when Congress uses broad, sweeping language to waive immunity for a large category of

government activities, it is presumed to mean exactly what it says. In such a case, Congress has waived immunity for all federal activities fitting within that category of activity and the courts may not defeat Congressional intent by narrowing the scope of the waiver. Thus, in *Goodyear Atomic Corp. v. Miller,* 108 S. Ct. 1704, 1711 (1988), the Court rejected the contention that a federal workers' compensation act failed to waive immunity for state penalties, because the statute made the federal government liable "in the same way and to the same extent" as a private person. In addition, in a case construing the waiver for "any claims . . . on account of personal injury" in the Federal Torts Claims Act, this Court found that Congress had waived immunity for each and every claim on account of personal injury (except for exceptions expressly set forth in the statute). *Yellow Cab,* 340 U.S. at 548-50. The Court rejected the government's claim that the statute was not "sufficiently specific." *Id.,* at 555.

Where Congress has provided a broad waiver of immunity, the scope of the waiver must not be narrowly limited by a court's construction of its terms. *Canadian Aviator v. United States,* 324 U.S. 215 (1945). Congressional intent is not to be "thwarted by an unduly restrictive interpretation." *Id.* Where the meaning of the words used in the waiver imposes the same liability on the United States as it does on a private person, this waiver should be honored. *Id.* See also, *Weyerhaeuser Steamship Co. v. United States,* 372 U.S. 597, 600 (1963).

The Court has also stated that it will not judicially create or expand exceptions to a general waiver. *Kosak,* 465 U.S. at 853, n. 9. Creating exceptions to its general waivers is the function of Congress, not the courts.

DOE relies heavily on *Missouri Pacific Railroad v. Ault,* 256 U.S. 554 (1921), in an attempt to contradict this principle of statutory construction and to argue that the waiver language construed in the *Ault* case was similar to that in the case at bar. However, the statute in Ault provided that the waiver in question applied only to the degree consistent with an order of the President. An order of the President,

in turn, expressly excluded the assessment of penalties. This is why penalties were disallowed in *Ault*, rather than being due to a hypercritical interpretation of the statute's sweeping waiver language. *Id.*, at 562, n. 1.

The Court's refusal to strap Congress into a straitjacket of specificity serves a useful function. Requiring Congress to enact waivers only in the form of exhaustive and complex lists of each and every specific application, instead of broadly categorizing them, could result in Congress easily missing specific items it intended to include. Insisting on itemization would exalt style over substance and would defeat the intent of Congress where it intended to waive immunity on a broad scale.

B. Because The RCRA Waiver Includes All "Requirements" Without Limitation, And Because The Common Meaning Of "Requirements" Includes Civil Penalties, The Court Of Appeals Erred In Deleting Penalties From The Waiver.

The RCRA waiver in 42 U.S.C. 6961 waives immunity from *all* requirements, as follows:

> Each department . . . shall be subject to, and comply with, *all* federal [and] state . . . requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) . . . .

(Emphasis added). In common usage, "requirements" is defined as "something called for or demanded." *Maine v. Navy*, 702 F.Supp. at 326, citing *Webster's Third New International Dictionary*. Hazardous waste civil penalties, being called for or demanded by the hazardous waste laws, are obviously requirements of those laws. *Id.*, 326-27.

To make the waiver even more explicit, the language in

parentheses gives some examples of procedural requirements. Permits, reports, injunctive relief, and sanctions to enforce injunctive relief are all listed as examples of requirements.

The examples within parentheses do not constitute a complete list of requirements for which sovereign immunity is waived. The section unequivocally states that federal facilities are subject to "*all* . . . requirements" (emphasis added), *including* those listed within the parentheses. The word "including" is a term of enlargement meant to illustrate rather than a limitation meant to exclude all items not specifically listed. *P.C. Pfeiffer Company v. Ford*, 444 U.S. 69, 77 n. 7 (1979); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941). Therefore, the list in parentheses is meant to illustrate rather than to be exclusive.

The nature of the examples in the parenthetical list of requirements also demonstrates that "requirements" include enforcement mechanisms. Injunctive relief and sanctions to enforce such relief are enforcement mechanisms, not substantive obligations. Therefore, "requirements" obviously include enforcement mechanisms. Any other interpretation of the section would be illogical, by saying, on the one hand, that two enforcement mechanisms are requirements and on the other hand, that requirements exclude enforcement mechanisms. Statutes must be construed in a manner which will avoid inconsistency. *Helvering v. Credit Alliance Corp.*, 316 U.S. 107, 112 (1942). Because Congress has waived immunity for *all* requirements, federal facilities are subject to all enforcement mechanisms, including civil penalties.

Finally, 42 U.S.C. 6961 waives immunity for all requirements "in the same manner, and to the same extent" as private persons. This quoted language is almost identical to the language construed by this court in *Goodyear Atomic Corp.* to provide a broad waiver without exceptions. 108 S. Ct. at 1711. Obviously, Congress did not intend to place limitations on the RCRA waiver either.

C. By Admitting That The Plain Meaning Of "Requirements" Includes Civil Penalties, And Then Manufacturing Ambiguity As An Excuse To Except Penalties From That Plain Meaning, The Court Of Appeals Violated The Rules Of Statutory Construction Followed By This Court.

The district court in *Maine v. Navy* remarked that "an intelligent person reading the statute would think the message plain" that RCRA requirements include civil penalties. 702 F.Supp. at 326. That court noted that it would have been "nonsensical" to require Congress to make a detailed itemization of requirements in federal law and the laws of fifty states. *Id.*, at 327.

Similarly, the court of appeals below acknowledged:

> An ordinary reading of the phrase, "all . . . requirements," indicates that a civil penalty is a "requirement" because a party violating the statute will be required to pay the penalty.

App. to DOE Pet., p. 10a. Thus, even the court of appeals realized that the plain meaning of the words of the statute encompassed civil penalties.

Despite the admonitions of this Court to utilize the ordinary meaning of the words in a waiver, *Kosak*, 465 U.S. at 853, the court of appeals discarded the ordinary meaning of "requirements" in favor of searching elsewhere for ambiguity. The first reason cited by the court of appeals for ignoring the plain meaning of the term concerned some differences in the language of RCRA and Clean Water Act waivers. App. to DOE Pet., p. 11a. However, the courts are not allowed to insert ambiguity into the otherwise clear language of RCRA by looking to another statute. As the Court stated in *Yellow Cab Co.*, 740 U.S. at 550, the courts may not whittle down a broadly worded waiver by resorting to "refinements."

By deviating from the plain meaning of "requirements,"

the court of appeals also violated the admonition in *Turkette*. As discussed above, *Turkette* warns the courts to effectuate the plain meaning of words of waiver unless there is a *clear* Congressional mandate to differentiate from that plain meaning. 452 U.S. at 580. The court of appeals found no such clear mandate but disregarded the plain meaning of "requirements" anyway.

The second reason given by the court of appeals for its interpretation is the absence of a "specific mention" of "monetary relief or civil penalties." *Id.*, at 11a-12a. This reason for declining to find a waiver in 42 U.S.C. 6961 runs afoul of two principles elucidated in decisions of the Court. First, Congress is not required to itemize each and every item for which federal agencies are liable but may instead enact broad, sweeping waivers. *Yellow Cab*, 340 at 548. Therefore, the absence of the word "civil penalties" from the parenthetical list of "requirements" is not troubling. Second, strict construction may not be used to create exceptions to a sweeping waiver unless Congress has set forth the exceptions in the statute. *Id.; Kosak*, 465 U.S. at 853. Under these cases, the court below was not permitted to speculate that the absence of the term "civil penalties" could mean an exception for penalties, since Congress has created a waiver for "all . . . requirements."

The court of appeals thus rewrote 42 U.S.C. 6961 to create an exception not expressed in the plain language chosen by Congress for the waiver. The court below, in fact, went out of its way to find a meaning for the waiver other than the one intended by Congress. By struggling to find an ambiguity in the waiver, the court of appeals has violated this Court's rules of statutory construction and has thwarted Congressional intent.

The waiver in 42 U.S.C. 6961 broadly requires federal agencies to be treated "in the same manner, and to the same extent" as the private sector. The court of appeals' decision nullifies this waiver and contradicts this Court's broad construction of almost identical language in *Goodyear Atomic Corp.* Only if penalized in the same fashion as private

citizens will federal agencies refrain from their costly, dangerous pollution activities. In order to halt this preferential treatment of polluting federal agencies by a number of the courts, the State respectfully requests that the Court grant the State's petition to hear the state hazardous waste penalty issue.

VI. If The Court Reverses The Decision Below With Respect To State Water Pollution Penalties, It Should Find That The Citizen Suit Provision Of The Clean Water Act Waives Immunity From Civil Penalties.

The Court has noted that a federal appellate court may decide an issue not adjudicated below where the proper resolution of that issue is clear. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). If the Court grants DOE's Petition with respect to state water pollution penalties and reverses the court of appeals' determination of that issue, DOE would still be subject to penalties pursuant to the waiver in the Clean Water Act citizen suit provision. As a result, the court of appeals' finding of mootness for the citizen suit penalty issue would be erroneous and the Court should review that matter as well.

Because 33 U.S.C. 1365 uses waiver language virtually identical to that of the RCRA citizen suit provision, the same analysis applies to both provisions. Therefore, the State incorporates by reference herein its discussion of the language of the RCRA citizen suit provision from its Brief in Opposition to DOE's Petition.

In addition, civil penalties authorized by 33 U.S.C. 1365 obviously "arise under federal law." This phrase and another specific reference to civil penalties in 33 U.S.C. 1323 would become nullities if the Court declined to find a waiver for either state or federal penalties. The waiver for these penalties is clear and should be defined as such by the court rather than requiring unnecessary additional litigation on that issue before the court of appeals.

CONCLUSION

In the event the Court grants the Petition filed by the Department of Energy, the State's Cross-Petition for a Writ of Certiorari should also be granted.

Respectfully submitted,

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